IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 22ND AUGUST 2007 / 31ST SRAVANA 1929

FAO.No. 149 of 2003

AGAINST THE JUDGMENT AND DECREE IN AS.13/2001 of SUB COURT, NEDUMANGAD DATED 25.11.2002. OS.134/1999 of ADDL.MUNSIFF COURT,NEDUMANGAD

APPELLANT/RESPONDENT/PLAINTIFF.

M.JOHNY, S/O.MANUEL, PUTHUVAL PUTHEN
VEEDU, PAZHAYA ROAD, PONGUMMOODU, MEDICAL COLLEGE,
THIRUVANANTHAPURAM.

BY ADV. SRI.G.SUDHEER KARAKONAM

RESPONDENTS: APPELLANT/DEFENDANTS.

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1. KRISHNAMMA, D/O.MARIYA,
ROADARIKATHU VEEDU, KAZHAKKUNNU,
CHULLIMANOOR PO, THIRUVANANTHAPURAM.

2. PRABHA, D/O.KRISHNAMMA, DO. DO.

3. BABY, S/O.KOMALA BAI, DO. DO.

BY ADV. SRI.T.A.UNNIKRISHNAN
SRI.K.SATHEESH KUMAR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 22/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

F.A.O. NO. 149 OF 2003

Dated this the 22nd day of August, 2007

JUDGMENT

The plaintiff in O.S.No.134 of 1999, on the file of the court of the Additional Munsiff of Nedumangadu, challenges the order of remand in A.S.No.13 of 2001, Sub Court, Nedumangadu.

2. The suit was filed by the respondents for eviction and for prohibitory injunction. There are two items of immovable properties, namely, 'A' schedule having an extent of 21 cents and 'B' schedule which forms part of 'A' schedule. The building in 'A' schedule is shown as 'B' schedule. The first defendant is the sister of the plaintiff. Second defendant is the daughter of the first defendant and the third defendant is the son-in-law of the first defendant.

3. The case of the plaintiff is that the plaint schedule property was purchased by him as per Ext.A1 sale deed dated 16.10.1986, Sub Registrar's Office, Nedumangadu. The plaintiff constructed a tiled building consisting of four rooms and a verandah. On 19.12.1995, the first defendant requested the plaintiff to allow the former to reside in the plaint 'B' schedule building along with the plaintiff and his family. On account of

the love and affection towards the first defendant, the request made by the first defendant was accepted by the plaintiff. On 12.10.1998, the first defendant brought the second and third defendants to the plaint schedule house in spite of the objection raised by the plaintiff. In spite of the request made by the plaintiff, the defendants did not vacate the building. Ext.A3 notice dated 19.12.1998 was sent to the first defendant. The suit was filed for eviction of the defendants from plaint 'B' schedule building and for a permanent prohibitory injunction restraining the defendants from trespassing upon plaint 'A' schedule property or from committing waste therein.

4. The case of the defendants is that the plaint schedule property originally belonged to one Anchi. The first defendant and her family members were residing in the plaint schedule building for the last twenty years. The first defendant had no knowledge regarding the sale of the plaint schedule property by Anchi in favour of the plaintiff. He got the plaint schedule property for a very low consideration. The first defendant had agreed to purchase the plaint schedule property from the plaintiff for a consideration of Rs.35,000/- and she had sold her gold ornaments for purchasing the property. The first defendant paid the amount so arranged as advance sale consideration. The plaintiff executed an agreement for

sale in favour of the first defendant, agreeing to sell the plaint schedule property for a consideration of Rs.35,000/- and he acknowledged payment of Rs.30,000/-. Possession of the plaint schedule property and the building thereon was handed over to the first defendant. The first defendant is possessing and enjoying the property. The first defendant got employment abroad and she left India leaving her children and mother in the plaint schedule property. After return to India, the first defendant decided to construct a residential house in the place of the existing one. Accordingly, she constructed the house in the plaint schedule property. She spent money for construction and utilised loan granted by the local panchayat under 'JRY Scheme'. It was contended that the suit is bad for non-joinder of necessary parties as daughter and son-in-law of the first defendant were not made parties to the suit.

5. Before the trial court, PW1 was examined and Exts.A1 to A4 were marked on the side of the plaintiff. DWs.1 to 3 were examined and Exts.B1 to B3 and Ext.X1 were marked on the side of the defendant.

6. The trial court decreed the suit and directed the defendant to surrender vacant possession of the plaint 'B' schedule building. Permanent prohibitory injunction was also granted in favour of the plaintiff. The trial

court found that the plaintiff has title to the property. As regards the case put forward by the first defendant that there was an agreement to sell the property to her, the trial court found that no acceptable evidence was adduced by the defendant to substantiate such a contention. The court below also considered the oral and documentary evidence in the case and held that there is no evidence to show that the house was constructed by the first defendant. The trial court noticed that no suit for specific performance was filed by the first defendant and that her case was that she paid Rs.30,000/- to the plaintiff about 25 years back.

7. . The defendants challenged the judgment and decree of the trial court in appeal. Before the Appellate Court a contention was put forward by the appellants that they may be permitted to amend the written statement incorporating additional grounds to claim kudikidappu right and also to claim value of improvements. A prayer was made by the defendants to set aside the judgment of the trial court and to remand the case to the trial court for fresh disposal. The court below found that the plaint B schedule house was constructed by the first defendant with the permission of the plaintiff. The court below thereafter entertained the plea raised by the defendants that an opportunity may be granted to the defendants to amend the written statement to claim value of improvements.

After having found that the plaintiff has title to the property and that he is entitled to get a decree for eviction and prohibitory injunction, the court below remanded the suit to the trial court, after setting aside the judgment and decree of the trial court. An opportunity was afforded to the defendants to amend the written statement incorporating a claim for value of improvements. The trial court was also directed that opportunity shall be granted to the defendants to adduce further evidence regarding the construction of plaint 'B' schedule building.

8. I.A.No.3158 of 2007 was filed by the appellants to amend the Memorandum of Appeal and to incorporate paragraph 5, wherein the following substantial questions of law are sought to be raised.

> "(i) Is not the Lower Court erred in remanding the case for the purpose of determining the value of improvements when there is no such pleadings or prayer in the written statement or when trial Court has not raised any issue?
>
> (ii) Is not Lower Appellate Court went wrong in remanding the suit for determining the value of improvements when there is absolutely no evidence adduced by the respondents to the effect that the construction was made by them?"

I.A.No.3158 of 2007 was filed in the light of the decision of the Supreme Court that an order of remand can be challenged only on substantial questions of law. After hearing the counsel for the respondents, I am of the

view that I.A.No.3158 of 2007 requires to be allowed. Accordingly, the following substantial questions of law are raised for consideration:

> "(i) Was the court below justified in remanding the case to the trial court to consider the question of value of improvements when no such plea was raised by the first defendant in the written statement filed by her?
>
> (ii) Was the court below justified in remanding the case to the trial court permitting the first defendant to amend the written statement incorporating the claim for value of improvements?"

9. After having heard the counsel for the appellant and the respondent, I am of the view that the order of remand to the trial court was not justified. There is no case for the defendants that they were denied an opportunity to adduce evidence. There is also no case for the defendants that the evidence on record would not enable the court to decide the case effectually and finally. Therefore, the prayer to adduce further evidence cannot be justified. A remand for that purpose should not have been made by the Lower Appellate Court.

10. That the plaintiff has title to the property cannot be disputed. The specific case of the first defendant is that she entered into an agreement for sale with the plaintiff for a total consideration of Rs.35,000/- and an advance of Rs.30,000/- was paid. In view of this plea, there is a

clear admission of the title of the plaintiff. Therefore, finding of the court below that the plaintiff has title to the property requires to be confirmed.

11. The trial court found that the agreement for sale set up by the first defendant is not proved. The Appellate Court has not rendered any finding on that aspect. In view of the contentions raised by the defendants, the court below should have rendered a finding on that contention.

12. As regards the claim for value of improvements, in the facts and circumstances of the case, I am of the view that it is not necessary to remand the case to the trial court. The first defendant can be permitted to file an application for amendment of the written statement before the Lower Appellate Court. The Lower Appellate Court shall consider the claim for value of improvements on the basis of the evidence already on record. In other words, no further evidence shall be permitted to be adduced in support of such claim for value of improvements.

13. Detailed discussion of the facts and evidence is not being made in this judgment in view of the fact that I am directing the Lower Appellate Court to decide the issue involved in the case on the basis of the evidence on record. Therefore, it would cause prejudice to both parties if detailed

discussion is made and findings are arrived at in this judgment.

14. For the foregoing reasons, the appeal is allowed with the following directions:

a) Judgment of the court below as well as the remand order are set aside.

b) The court below shall dispose of the Appeal on the merits. It is made clear that the finding of the court below that the plaintiff has title to the property is confirmed. The court below shall consider the contention raised by the first defendant that she had entered into an agreement for sale with the plaintiff. The decision shall be taken on the basis of the evidence on record.

c) The court below shall permit the first defendant to amend the written statement incorporating a claim for value of improvements. The plaintiff shall be afforded an opportunity to file a rejoinder. The court below shall consider the question of value of improvements on the basis of the evidence already on record. No further evidence shall be entertained to substantiate the claim for value of improvements.

d) The court below shall dispose of the Appeal on the merits in the light of the findings and observations made above, within a period of six months.

e) parties shall appear before the court below on 24.9.2007.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

F.A.O.NO. 149 OF 2003

JUDGMENT

22nd August, 2007